NO. 3468

# United States Circuit Court of Appeals

## For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner.

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

## On Petition for Revision

**Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Territory of Alaska, Division No. 1.**

## BRIEF FOR RESPONDENT

JOHN RUSTGARD,
Attorney for Respondent.

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## BRIEF FOR RESPONDENT

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### STATEMENT OF FACTS.

In his statement of facts counsel for petitioner omits the very points upon which the lower court decided the case.

He also misstates the reasons which the lower

court assigned as the grounds for reversing the decision of the Referee.

The contract in question was between two citizens of the State of Washington. Both contracting parties were Washington corporations. (Tr. p. 14).

Section 660, for this reason, does not apply to this case. That section provides that, "If any such corporation or company shall fail to comply with any of the provisions of this chapter, all contracts with *citizens of the district* shall be void."

The Craig Lumber Company not being a citizen of the District (now Territory) of Alaska it cannot invoke this provision of the law.

Under these circumstances only section 657 is applicable. This section provides for a penalty of $25.00 per day for each day a foreign corporation does business in the territory without a compliance with the laws, and in addition, provides that its contracts shall not be void but only "*voidable at the election of the other party.*"

The learned court below held that section 657, and not section 660, applied to this case.

The learned court below also held that the delinquencies of respondent were merely technical and not substantial, and for that reason not material in a case of this kind.

## ARGUMENT.

### I.

### CONTRACT ONLY VOIDABLE AND NOT VOID.

Statutes so highly penal as section 660 will be strictly construed. Petitioner will not be permitted to retain the benefits of respondent's labors and expenditures without paying for them, unless the language of the statute clearly and unequivocally enjoins such unjust course.

The penalty imposed by section 660 is expressly confined to contracts "with citizens of the district." No excuse is shown for extending the provisions of this section to contracts with others than those who are citizens of the district.

This is not a new subject to the courts. We quote from Ruling Case Law:

> "Even when a statute expressly provides that if a foreign corporation shall fail to comply with the requirements all its contracts with citizens of the state shall be void as to it, and shall not be enforced in its favor by the courts of the state, it has been held that the penal consequences of non-compliance, cannot be extended beyond the boundaries defined, and that the contract between foreign corporations and persons who *are not citizens* are not affected thereby." 12 R. C. L. 91.

To summarize:

Section 657 provides a penalty as follows:

"*Every* contract made by such corporations shall be voidable."

Section 660 provides:

"All its contracts *with citizens of the district* shall be void."

The natural interpretation of these provisions must be that every contract made by such a corporation shall be voidable unless it is made with a citizen of the district, in which event the contract shall be absolutely void.

> "It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause and sentence. It is the duty of the court, so far as practicable, to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each."

36 Cyc. 1128.

To hold that every contract made by the delinquent corporation, whether with citizens or not, shall be void, is to disregard and nullify the provisions of section 657. The only manner in which effect can be given to both sections is to draw the distinction which the language of the two sections clearly points

out, namely, a contract made by the delinquent corporaton is voidable except in cases where it is made with citizens of the district, in which latter event the contract is absolutely void and unenforcible.

The Craig Lumber Company is not a citizen of Alaska. It is a citizen of the State of Washington. It is a foreigner with a right of residence in the territory.

It may do business in the territory only by right of comity, and that comity has been extended upon condition.

A corporation is a citizen of the state in which it is incorporated and from which it holds its charter or right to exist, and though it is given the right to do business in another state, it may insist on its foreign citizenship whenever it is sued in a state in which it is only a resident.

10 Cyc, 150.

Obviously the Craig Lumber Company cannot claim the provisions of section 660 as against its fellow-citizen of the State of Washington.

Under the terms of section 657 by which the contract is merely "voidabel," the contracting party cannot sit by in silence and wait until the contract is fully executed, then retain the benefit of the contract and declare it void as far as the payment for that benefit is concrned.

It will be observed that respondent contracted to

furnish the labor in cutting saw logs for the bankrupt corporation. This contract was executed by respondent and the latter now claims a lien on those logs for that labor so performed. (Tr. p. 15.)

Under statutes like 657 the courts will not hold the contract void and unenforcible where the benefits are retained by the other party.

12 R. C. L. 91.

*Fritz v. Palmer*, 132 U. S. 282.

*Johnson v. Brewing Co.*, 178 Fed., 513.

II.

No Violation of the Statutes.

It will be observed that respondent corporation did not flout the law but made an honest effort to comply. The delinquency is purely technical and unintentional. That is evidently the view taken by the United States Attorney, for no prosecutions were instituted by him under section 657.

Section 654 provides that a foreign corporation, to be entitled to do business in Alaska, must file certain documents in two spearate places in the territory. One set of the documents must be filed in the office of the Secretary of the District (now Territory), and one set in the office of the Clerk of the District Court.

In the First Division of Alaska the office of the Secretary of the Territory and of the Clerk of the District Court are in the same town, to-wit, in Juneau, Alaska.

On the 12th of December, 1917, respondent filed the required documents in the office of the Clerk of the District Court at Juneau.

During the months of January and February, 1918, it filed the required documents in the office of the Secretary of the Territory, also at Juneau.

But there were certain technical defects in these papers. The annual statement was not filed in the Clerk's office until February 11th, 1918.

The acceptance by L. J. MacDonald of his appointment as Agent was not subscribed by him, but it is admitted that his appointment was duly filed, and that on the same paper was written in Mr. MacDonald's handwriting an acceptance of that appointment, and that the defect in the document consists in the failure of Mr. MacDonald to attach his signature. However, L. J. MacDonald did sign the acceptance of his appoinment upon the documents filed in the office of the Secretary of the Territory.

It is respectfully submitted that the statute does not require the acceptance to the "subscribed." The acceptance was written by the agent himself, and that fact is admitted. It is immaterial whether or not he attached his signature *underneath.* If he stated "I, L. J. MacDonald, hereby accept the foregoing appointment," it is sufficient.

36 Cyc. 449.

It is also admitted that the annual statement filed February 16th, 1918, in the office of the Secre-

tary of the Territory, was not verified by both the President and the Secretary in conformity with the requirement of the statute, nor was it attested by the directors.

It will be observed, however, that the respondent corporation regularly each year paid its annual license fee of $15.00 to the Territory, as required by Chapter 11 of the Session Laws of the Territory of Alaska for the year 1913.

Under the circumstances it is respectfully submitted that the delinquencies are not such as to warrant the court in treating the corporation as an outlaw.

"Even though it is held that the statute of a state requiring foreign corporations to do and perform certain acts before commencinng to do business in such state is mandatory, and must be complied with before such corporation will be allowed to maintain an action to enforce contracts, yet it is usually held that a substantial compliance with a statute by a foreign corporation will entitle it to enforce its contracts."

12 R. C. L., 88.

Respectfully submitted,

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Attorney for Respondent.